

04-344

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Wireless Telecommunications Bureau)
Announces Use Of An Additional)
Frequency For The United States Coast)
Guard's Ports and Waterways)
Safety System)

Applications for Equipment)
Authorization of Universal Shipborne)
Automatic Identification Systems To be)
Coordinated with the U.S. Coast Guard)
to Ensure Homeland Security)

Public Notice DA 02-1362

RECEIVED

OCT 27 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Public Notice DA 02-1499

To: The Commission

SUPPLEMENT TO EMERGENCY PETITION FOR DECLARATORY RULING

MariTEL, Inc. ("MariTEL"), by its counsel and pursuant to the provisions of section 1.2 and 1.41 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. §§ 1.2, 1.41 (2003), hereby supplements its October 14, 2003 request for an emergency declaratory ruling ("Petition") that shipborne Automatic Identification System ("AIS") transmitters may not operate on the frequency assignments 161.975 MHz (VHF marine channel 87B) and 162.025 MHz (VHF marine channel 88B) or any other channel designated for use by VHF public coast ("VPC") shore stations.^{1/}

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^{1/} *Wireless Telecommunications Bureau Announces Use of An Additional Frequency for the United States Coast Guard's Ports and Waterways Safety System; Application for Equipment Authorization of Universal Shipborne Automatic Identification Systems To be Coordinated with the U.S. Coast Guard to Ensure Homeland Security*, DA Nos. 02-1362, 02-1499, *Emergency Petition for Declaratory Ruling* (filed Oct. 14, 2003) ("Petition") attached hereto as **Exhibit A**.

INTRODUCTION AND SUMMARY

As MariTEL explained in the Petition, it entered into a Memorandum of Agreement (“MOA”) with the United States Coast Guard (“Coast Guard”), which provided the Coast Guard with the use of frequency assignments 157.375/161.975 MHz (VHF channels 87A/B) for use in the Ports and Waterways Safety System (“PAWSS”). While the MOA was in effect, the Coast Guard asked the FCC to permit “other users of shipborne AIS equipment to operate on these frequencies for interoperability with the Coast Guard.”^{2/} In response, the Wireless Telecommunications Bureau (the “Bureau”) issued the *June 13 Public Notice*, which permitted the use of shipborne AIS equipment to be employed by existing ship station licensees.^{3/} After extensive negotiations, MariTEL and the Coast Guard were unable to agree on the implementation of certain provisions of the MOA and, pursuant to its authority under the terms of the MOA, MariTEL terminated the MOA. As MariTEL explained in the Petition, despite the Coast Guard’s loss of the right to use these frequencies upon the termination of the MOA, the Coast Guard nonetheless adopted interim regulations designed to require that vessels carry AIS transmitters which use channel 87B (and 88B) on a default basis.^{4/} Shortly after MariTEL filed

^{2/} “Wireless Telecommunications Bureau Announces Use of An Additional Frequency for the United States Coast Guard’s Ports and Waterways Safety System,” *Public Notice*, DA 02-1362 (rel. June 13, 2002) (“*June 13 Public Notice*”); “Applications for Equipment Authorization of Universal Shipborne Automatic Identification Systems To be Coordinated with U.S. Coast Guard to Ensure Homeland Security,” *Public Notice*, DA 02-1499 (rel. June 27, 2002) (the “*June 27 Public Notice*,” and collectively, with the “*June 13 Public Notice*,” the “*Public Notices*”).

^{3/} *Id.*

^{4/} Petition at 4, 11. “Automatic Identification System; Vessel Carriage Requirement,” 68 Fed. Reg. 39359 (July 1, 2003) (“Interim AIS Rule”) (establishing an interim rule to require AIS on all vessels); *see also* “Automatic Identification System; Expansion of Carriage Requirements for U.S. Waters,” 68 Fed. Reg. 39369 (July 1, 2003) (collectively, “Coast Guard AIS Carriage Requirement”) (soliciting comments on how to identify vessels that are required to be equipped with and operate AIS systems); *see also* United States Coast Guard Docket, USCG-2003-14787, Supplement to Comments, *available at* http://dmses.dot.gov/docimages/pdf86/247362_web.pdf (including the FCC’s *June 13 Public Notice* in the rulemaking docket as authority to enact rules).

its Petition the Coast Guard adopted its *final* AIS carriage requirements (the “Final AIS Rule”).^{5/} Accordingly, MariTEL supplements the Petition to bring to the Commission’s attention the Final AIS Rule. The Coast Guard’s decision adopting the Final AIS Rule makes it more apparent than ever that without FCC action, proliferation of shipborne AIS stations will occur, destroying MariTEL’s ability to use its assigned spectrum.

DISCUSSION

In response to the Interim AIS Rule, MariTEL argued that the Coast Guard should not proceed with the adoption of AIS carriage requirements because of its inability to ensure that channel 87B would be available for AIS operations. Similarly, MariTEL argued that the Coast Guard’s adoption of carriage requirements which implicate the use of channel 87B and 88B for AIS transmissions would create harmful interference to MariTEL and would result in MariTEL causing harmful interference to AIS reception.

Nevertheless, the Final AIS Rule demonstrates that the Coast Guard believes it has no responsibility whatsoever with respect to the frequencies on which AIS transmissions are conducted (“The Coast Guard does not have authority to designate frequencies for AIS use...”).^{6/} Instead, apparently relying on the Public Notices, the Coast Guard stated that “FCC policies authorize the use of AIS frequencies (AIS1, Channel 87B, 161.975 MHz and AIS2, Channel 88B, 162.025 MHz) on existing ship station licenses.” It is evident, therefore, that the Coast Guard, which explicitly states that its carriage requirements mandate the use of channels 87B and 88B for AIS, believes that the FCC has authorized the use of those channels for that purpose.

^{5/} “Automatic Identification System; Vessel Carriage Requirement,” 68 Fed. Reg. 60559, 60563 (2003) attached hereto as **Exhibit B**.

^{6/} *Id.*

For the reasons stated in the Petition, the Public Notices could not have specified channels 87B and 88B for AIS transmissions. Accordingly, the Commission must immediately clarify that the Coast Guard's interpretation of the Public Notices is incorrect. If the Commission does not act expeditiously, parties will shortly begin to comply with the Final AIS Rule. Such a result will create destructive and irreparable interference to MariTEL's own commercial endeavors and will destroy MariTEL's ability to use its own frequencies. MariTEL, therefore, reiterates that the Commission must clarify that the *June 13 Public Notice* did not afford parties with any basis for operating on channels 87B and 88B and clarify that use of MariTEL's frequencies for AIS purposes is unlawful.^{7/}

^{7/} Petition at 10-11.


CONCLUSION

For the foregoing reasons, MariTEL requests that the Commission, clarify immediately, but no later than November 21, 2003, that these ship stations are not permitted to transmit on channels 87B and 88B.^{8/}

Respectfully submitted,

MariTEL, Inc.

By:



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October 27, 2003

^{8/} MariTEL originally asked that the FCC act by November 25, 2003. At the time it submitted the Petition, it believed that the Final AIS Rule would be effective on that date. However, based on the Coast Guard's recent publication of the Final AIS Rule, it is now apparent that the Final AIS Rule will be effective on November 21, 2003. Accordingly, MariTEL asks the FCC to act by that time.

CERTIFICATE OF SERVICE

I, Susan F. Duarte, do hereby certify that on this 27th day of October, the foregoing Supplement to Emergency Petition for Declaratory Ruling was served on the following persons by the method indicated:

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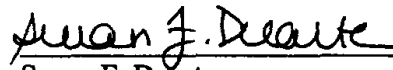
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* Via Hand Delivery

** Via first-class United States mail, postage prepaid

Exhibit A

Before the
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To: The Commission

EMERGENCY PETITION FOR DECLARATORY RULING

MariTEL, Inc.

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October 15, 2003

SUMMARY

MariTEL Inc. ("MariTEL") hereby seeks an emergency declaratory ruling from the Commission that shipborne Automatic Identification System ("AIS") transmitters may not operate on the frequency assignments 161.975 MHz (VHF marine channel 87B) and 162.025 MHz (VHF marine channel 88B) or any other channel designated for use by VHF public ("VPC") shore stations. This declaratory ruling is necessary to remove any uncertainty regarding the use of shore station channels 87B and 88B by shipborne AIS transmitters caused by the Wireless Telecommunications Bureau's (the "Bureau's") release of two *Public Notices* issued in June, 2002. MariTEL requests that the Commission issue a ruling before November 25, 2003 to prevent MariTEL from suffering irreparable harm based on the planned proliferation of these transmitters.

The Commission should clarify that the *Public Notices* did not amend Section 80.371(c) of the Commission's rules by permitting shipborne stations to transmit on channels 87B and 88B. These channels are designated for coast station and not ship station use. Use of these channels by ship stations would violate Section 80.371(c) of the rules. Use of these channels for ship station operations would also violate the Administrative Procedure Act (the "Act"), which requires that substantive rule changes conform to the requirements set forth in the Act.

During the pendency of the Memorandum of Agreement ("MOA") between MariTEL and the United States Coast Guard, the FCC may have had reason to believe that shipborne AIS stations could transmit on channel 87B. However, if that reason ever existed (and MariTEL believes it did not) it does not now, in light of the termination of the MOA. If the FCC does not clarify the *Public Notices*, the shipborne transmission of AIS messages on shore station channels will cause destructive interference to MariTEL's and incumbent licensees' operations and will prevent MariTEL from recouping the substantial investment it made participating in Auction 20 and implementing a marine data network.

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To: The Commission

EMERGENCY PETITION FOR DECLARATORY RULING

MariTEL, Inc. ("MariTEL"), by its counsel and pursuant to the provisions of Section 1.2 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.2 (2003), hereby requests an emergency declaratory ruling from the Commission that shipborne Automatic Identification System ("AIS") transmitters may not operate on the frequency assignments 161.975 MHz (VHF marine channel 87B) and 162.025 MHz (VHF marine channel 88B) or any other channel designated for use by VHF public coast ("VPC") shore stations. This declaratory ruling is necessary to remove any uncertainty regarding the use of shore station channels 87B and 88B by shipborne AIS transmitters caused by the Wireless Telecommunications Bureau's (the "Bureau's") release of the above referenced Public Notices.^{1/} Absent a decision before November 25, 2003, MariTEL will suffer imminent and

^{1/} "Wireless Telecommunications Bureau Announces Use of An Additional Frequency for the United States Coast Guard's Ports and Waterways Safety System," *Public Notice*, DA 02-

irreparable harm because ship stations will use these frequencies, thereby precluding MariTEL's use of its authorized frequencies.

I. BACKGROUND

MariTEL was the largest provider of VPC services in the United States and, through various predecessors in interest, provided ship-to-shore services for over forty (40) years.^{2/} In 1999 and again in 2001, MariTEL actively participated in the FCC's auctions of VPC station licenses.^{3/} As a result, MariTEL became the exclusive entity (except for site-specific incumbent licensees) authorized to operate 25 kHz duplex channels for VPC use. Among the channels for which MariTEL is licensed are channels 87 and 88.

Pursuant to the Commission's rules,^{4/} MariTEL and the United States Coast Guard ("Coast Guard") entered into a Memorandum of Agreement ("MOA"), which provided the Coast Guard with the use of VPC spectrum for use in the Ports and Waterways Safety System ("PAWSS"). In particular, the MOA permitted the Coast Guard to use the frequency

1362 (rel. June 13, 2002) (the "*June 13 Public Notice*"); "Applications for Equipment Authorization of Universal Shipborne Automatic Identification Systems To be Coordinated with U.S. Coast Guard to Ensure Homeland Security," *Public Notice*, DA 02-1499 (rel. June 27, 2002) (the "*June 27 Public Notice*," and collectively, with the "*June 13 Public Notice*," the "*Public Notices*").

^{2/} As MariTEL notified the FCC, it terminated its provision of voice communications services on June 6, 2003. *See In the Matter of Amendment of the Commission's Rules to Promote the Use of VHF Public Coast Station Frequencies, Petition for Rulemaking* at 1 n.2 (filed May 16, 2003) (referencing FCC File Nos. 0001252148, 0001252177, 0001252257, 0001252325, 0001252214, 0001252280, 0001252315 and 0001252335).

^{3/} "FCC Announces the Conditional Grant of 26 VHF Public Coast Station Licenses," *Public Notice*, DA 99-195, 1999 FCC LEXIS 2251 (rel. May 21, 1999) (announcing that MariTEL was the winning bidder of nine VHF public coast licenses); "VHF Public Coast and Location and Monitoring Service Spectrum Auction Closes: Winning Bidders Announced," *Public Notice*, DA 01-1443 (rel. June 15, 2001) (announcing that MariTEL was the winning bidder of seven inland VPC licenses).

^{4/} 47 C.F.R. § 80.371(c)(3).

assignments 157.375 MHz/161.975 MHz (VHF channels 87A/B) to support PAWSS operations. Absent the MOA, the Coast Guard had no rights to use these frequencies.

While the MOA was in effect, the Coast Guard notified the Bureau that the National Telecommunications and Information Administration ("NTIA") had approved the Coast Guard's use of VHF channels 87B and 88B on a nationwide basis for AIS.^{5/} It asked that the FCC permit "other users of shipborne AIS equipment to operate on these frequencies for interoperability with the US Coast Guard."^{6/} In response, the Bureau issued the *June 13 Public Notice*, which permitted the use of shipborne AIS equipment to be employed by existing ship station licensees, "including vessels that are licensed by rule."^{7/} The *June 27, 2003 Public Notice* announced procedures pursuant to which shipborne AIS equipment could be authorized.

Despite MariTEL's significant efforts, MariTEL and the Coast Guard were unable to agree on implementation of certain provisions of the MOA. Accordingly, on May 5, 2003, MariTEL, pursuant to its authority under the terms of the MOA, terminated the MOA. Although the parties tried to renegotiate terms of the MOA, they have been unable to reach a consensus on how the Coast Guard can use the spectrum without destroying MariTEL's ability to use the spectrum.^{8/} Now that the MOA is terminated, the Coast Guard's (or any other entity whose

^{5/} Letter from J. Hershey, Chief, Spectrum Management Division, United States Coast Guard, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (dated May 6, 2002).

^{6/} *Id.*

^{7/} *June 13 Public Notice* at 2.

^{8/} MariTEL acknowledges that it is required to make spectrum available to the Coast Guard for use in the PAWSS. 47 C.F.R. § 80.371(c)(3). MariTEL has tried on several occasions to offer the Coast Guard a portion of its spectrum. The Coast Guard has consistently asked for more from MariTEL than is required under the Commission's rules. In addition, the Coast Guard has walked away from the parties' negotiations and has failed to cooperate with MariTEL to reach a solution.

rights are derivative of those granted to the Coast Guard) rights to use this spectrum expire on November 5, 2003.^{9/}

Notwithstanding the Coast Guard's loss of the right to use these frequencies upon the termination of the MOA, the Coast Guard nonetheless adopted interim regulations designed to require that vessels carry AIS transmitters.^{10/} The Coast Guard AIS Carriage Requirement does not specify the channels on which AIS transmitters must operate; citing the *June 13 Public Notice*, it states instead that "matters pertaining to AIS licensing, equipment certification, and frequencies are subject to Federal Communications Commission regulations. . ."^{11/}

The *Public Notices* recognized that the FCC's rules do not otherwise contain "licensing, equipment certification, or frequency coordination requirements for AIS." However, as MariTEL demonstrates below, it is no longer appropriate (if it ever was) for the FCC to permit AIS transmitters to operate on channels 87B and 88B on an interim basis, in advance of its anticipated adoption of regulations in this area.

First, and as discussed further below, the *Public Notices* represent modification of rules outside the notice and comment procedure required by the Administrative Procedure Act ("APA"). Therefore, regardless of the Coast Guard's rights to the use of channel 87B that might

^{9/} MariTEL has permitted the Coast Guard to continue to use channel 87 at the four PAWSS locations (Sault Ste Marie, Lower Mississippi River, Prince William Sound, and Berwick Bay) where it believed channel 87 was in operation as of June 4, 2003, so as not to disrupt current operations. No other continued use of channel 87 was permitted.

^{10/} "Automatic Identification System; Vessel Carriage Requirement," 68 Fed. Reg. 39359 (July 1, 2003) (establishing an interim rule to require AIS on all vessels); *see also* "Automatic Identification System; Expansion of Carriage Requirements for U.S. Waters," 68 Fed. Reg. 39369 (July 1, 2003) (collectively, "Coast Guard AIS Carriage Requirement") (soliciting comments on how to identify vessels that are required to be equipped with and operate AIS systems); *see also* United States Coast Guard Docket, USCG-2003-14787, Supplement to Comments, available at http://dmses.dot.gov/docimages/pdf86/247362_web.pdf (including the FCC's *June 13 Public Notice* in the rulemaking docket as authority to enact rules).

^{11/} *Id.*

be derived from the MOA, the issuance of the *Public Notices* authorizing the use of shipborne transmitters on channels 87B and 88B was prohibited by law.

Second, whatever authority there may have been for ship stations to transmit on channel 87B during the period in which the MOA was valid (MariTEL believes that no such authority ever existed), all such authority terminates on November 5, 2003. The Coast Guard sought authority for ship stations to transmit on channel 87B on the basis of its agreement with MariTEL. That agreement is no longer in place, and the Coast Guard has strongly stated its intention not to pursue further renegotiation of the MOA.^{12/} MariTEL is the exclusive licensee of channel 87B (except for incumbent licensees) in maritime areas. MariTEL has not (and for the reasons noted below, could not have) permitted ship stations to operate on channel 87B or any other of MariTEL's authorized channels designated for use by shore stations.^{13/} Therefore, any use of channel 87B without MariTEL's permission violates MariTEL's rights and the FCC's rules.

Finally, and as further discussed below, ship stations' use of channels 87B and 88B with 25 kHz wide channels (*i.e.*, wideband channels) on a simplex basis will cause destructive interference to MariTEL's operations. When MariTEL agreed to permit Coast Guard use of channel 87, it agreed to do so on a duplex, narrowband (12.5 kHz wide) basis. Regardless of the

^{12/} Letter from C.I. Pearson, Rear Admiral, U.S. Coast Guard, Director of Information Technology to Dan Smith, President and CEO, MariTEL, Inc. (Sept. 12, 2003).

^{13/} MariTEL also believes it has the exclusive United States right to employ channel 88B along the Canadian border. *See In the Matter of MariTEL, Inc. Petition for Declaratory Ruling Regarding VHF Public Coast Channel 88 above Line A, Petition for Declaratory Ruling* (filed April 4, 2003). Accordingly, at least in the Canadian border area, use of channel 88B by shipborne AIS stations also violates MariTEL's rights as an FCC licensee. As explained more fully below, however, use of channel 88B by shipborne AIS facilities anywhere in the proximity of MariTEL's operations will cause destructive interference to MariTEL and must not be permitted.

existence of the MOA, use of channels 87B and 88B on a wideband, simplex basis, for shipborne AIS stations, will prevent MariTEL from meaningfully using any of its authorized frequencies.

A declaratory ruling, therefore, is appropriate in this case to remove any uncertainty as to whether shipborne AIS transmitters may operate on channels 87B and 88B.^{14/} In light of the potential violation of the APA, changed circumstances caused by the termination of the MOA, and the interference to MariTEL's operations, the Commission cannot permit the *Public Notices* to be interpreted to permit shipborne AIS transmitters to operate in the spectrum that was awarded to MariTEL by the Commission and otherwise authorized to incumbent licensees.^{15/}

II. DISCUSSION

A. Unless Clarified, the *Public Notices* Violate the APA

The Commission should clarify that the *Public Notices* did not amend Section 80.371(c) of the Commission's rules by permitting shipborne stations to transmit on channels 87B and

^{14/} 47 C.F.R. § 1.2 ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty"); 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); *see also Sprint Corp. v. Evans*, 846 F. Supp. 1497, 1510 (M.D. Ala. 1994) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act [5 U.S.C. § 554] on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

^{15/} MariTEL notes that this controversy extends beyond a dispute between MariTEL and the Coast Guard. As the Commission is aware, incumbent licensees continue to operate on this spectrum. VPC licensees are required to ensure that they do not create harmful interference to these licensees by way of their VPC license. Interference from the Coast Guard is likely to extend to these entities as well. *See, e.g., Amendment of the Commission's Rules Concerning Maritime Communications; Petition for Rule Making filed by Regionet Wireless License, LLC*, PR Docket 92-257, *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd 6685 ¶ 7 (2002) ("The new rules provided for a single licensee for all unassigned VHF public correspondence channels in each VPCSA, to be selected by competitive bidding. It permitted the continued operation of incumbents using VHF public coast station spectrum, and required incumbents and VPC licensees to afford each other interference protection."). The Commission should ensure that both MariTEL and incumbent licensees continue to be afforded protection from harmful interference.

88B. Section 80.371(c) of the rules provides that channels 87B and 88B are coast station channels and not ship station channels.^{16/} Ship stations are either authorized by rule or by separate FCC authorization if required by regulation, statute, or otherwise.^{17/} In either case, ship stations are not assigned particular channels on which to operate. Instead, they may operate on any channel permitted by the FCC's rules.^{18/} Channels 87B and 88B are not among those channels because, as stated above, they are designated for coast station use only.^{19/} Commission specification of channels on which ships and coast stations operate is crucial because use of the coast station frequencies by ship stations would render the employment of those channels by coast stations useless.

The *Public Notices*, however, create ambiguity with regard to how the provisions of Section 80.371(c) of the FCC's rules can be interpreted. The *Public Notices* do not appear to specify the channels that could be used for AIS purposes, but only reiterate the Coast Guard's own statements. However, based on the Coast Guard's May 6, 2002 letter, it is clear that it expected the FCC to permit shipborne AIS shipborne stations to transmit on channels 87B and 88B. The FCC must clarify that shipborne stations cannot transmit on these channels, in violation of Section 80.371(c) of the rules. Any other interpretation of the *Public Notice* would constitute a violation of the APA by permitting ships to transmit on shore station channels.

The APA defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or

^{16/} 47 C.F.R. § 80.371(c).

^{17/} 47 C.F.R. § 80.13.

^{18/} 47 C.F.R. § 80.13(b).

^{19/} 47 C.F.R. § 80.371(c).

policy . . .”^{20/} If the FCC concludes that the statements made in the *Public Notices* confer authority on shipborne stations to transmit on these channels, the statements would alter the requirements of Section 80.371(c) of the regulations and, therefore, constitute a rule change.

Such a substantive rule change must conform to the requirements set forth in the APA. The APA provides that rulemaking proceedings must be conducted pursuant to notice and comment.^{21/} The courts have confirmed this general rule that “the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation.”^{22/} Thus, interpreting the *Public Notices* to permit shipborne units to transmit on channels 87B and 88B would result in a substantial change to the provisions of Section 80.371(c) of the Commission’s rules. As the APA and the courts have made clear, the Bureau could not effectuate such a substantial change to a substantive Commission rule without first providing for notice and comment. Although the *Public Notices* indicate that the Commission is evaluating licensing, equipment certification, and frequency coordination requirements for AIS in a separate rulemaking,^{23/} the Bureau cannot eviscerate the rule making process by amending its regulations prior to the conclusion of the proceeding without violating the APA. The Commission, therefore, must clarify that the Bureau’s actions did not result in a rule change and do not afford parties with any basis for operating on these channels.

^{20/} 5 U.S.C. § 551(5).

^{21/} 5 U.S.C. § 553(b) and (c).

^{22/} *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001); *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”); *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997) (accord).

^{23/} *June 13 Public Notice* at 1; *June 27 Public Notice*.

B. Unless Clarified, the *Public Notices* Permit Unlawful Use of MariTEL's Frequencies

While the FCC may have had reason to believe during the pendency of the MOA that shipborne AIS stations could transmit on channel 87B pursuant to authority granted by MariTEL to the Coast Guard, that reason no longer exists. As explained above, when the FCC issued the *Public Notices*, the FCC believed that MariTEL and the Coast Guard reached an agreement to permit the Coast Guard to use this spectrum (and, at least as represented by the Coast Guard, allowed others to use it as well). Indeed, the Coast Guard's request to permit the use of AIS shipborne transmitters explicitly cited to the MOA as a basis for that request. Although there was no way for the Commission to anticipate this change in circumstances when it issued its *Public Notices*, its basis for making the statement regarding channel 87B has been eliminated in light of the termination of the MOA.^{24/} Without the MOA, the Coast Guard cannot now operate, or permit others to operate, on channel 87 without violating the Commission's rules and regulations.

As MariTEL has explained to the Coast Guard, AIS technology is extremely flexible and provides the Coast Guard with the ability to use other channels.^{25/} In addition, many technical options are available to the Coast Guard for both vessel traffic services and marine domain awareness applications with minimal impact to MariTEL.^{26/} Thus, if the Commission clarifies

^{24/} MariTEL notes that it has raised with the Bureau on three previous occasions its concern that the *June 13 Public Notice* is being erroneously interpreted as authorizing ships to use specific frequencies and mode of operation for AIS use in the US territorial waters. MariTEL hopes that an emergency declaratory ruling will resolve any uncertainties regarding its authorized spectrum.

^{25/} Letter from Dan Smith, President and CEO of MariTEL, Inc. to D'Wana Terry, Chief, Public Safety and Private Wireless Division, Federal Communications Commission at 1 (September 16, 2003).

^{26/} *Id.*

that channels 87B and 88B are not available for use by shipborne stations, the Coast Guard can still pursue its AIS endeavors; the Coast Guard will instead be required to use other available channels and solutions.

C. Unless Clarified, the *Public Notices* Permit Destructive Interference to MariTEL

Clarification that Section 80.371(c) is the prevailing rule and has not been altered by the Bureau's *Public Notices* to permit transmission on channels 87B and 88B by shipborne stations will ensure that MariTEL's own commercial endeavors are not destroyed. It is clear that shipborne transmission of AIS messages on shore station channels destroys MariTEL's ability to provide mariners communication services. Specifically, the IMO Guidelines for Installation of a Shipborne Automatic Identification System (AIS)^{27/} identifies AIS shipborne interference to a significant portion of MariTEL's licensed channels. Moreover, MariTEL's internal testing also shows that AIS operation on the "B" side of the channel precludes MariTEL's ability to provide marine communication services to every vessel carrying an AIS transmitter -- greater than 20,000 of the most economically attractive vessels -- and will make the spectrum unusable for land mobile applications in close proximity to AIS operations.

In addition, use of AIS on shore station channels destroys MariTEL's ability to plan, deploy, and operate a communications network because of the interference to the Coast Guard's AIS system. The International Association of Lighthouse Authorities ("IALA") recently accepted MariTEL's AIS interference analysis^{28/} that demonstrates the destructive interference to AIS systems from operations on MariTEL's licensed channels. IALA is actively considering

^{27/} See International Maritime Organization SN/Circ.227 at 3 (January 6, 2003).

^{28/} See "Automatic Identification System (AIS)/ Maritime Communication System (MSC) Interference Guidelines," presented by MariTEL to IALA Technical Working Group in Trondheim, Norway on August 28, 2003. The technical working group accepted the paper for presentation to the full IALA AIS Committee.

guidelines to minimize AIS interference, which may include the use of guardbands, geographic separation between stations, or other measures. In any case, if this action is allowed to stand, MariTEL -- and other incumbents -- will be left with frequencies that essentially are unusable, MariTEL will be unable to recoup its substantial investment in Auction 20, and will be unable to implement a marine data network as planned. It is in the public interest for the Commission to preserve the rights of its authorized licensees and to protect licensees from harmful interference of this type.^{29/}

D. Immediate Clarification of the *Public Notices* is Required

As noted above, the Coast Guard has promulgated an interim rule that requires ships to carry the AIS transmitters permitted by the *Public Notices*. Even though that interim rule is in effect today, it will become a permanent regulation on November 25, 2003. After that time, with each passing day, more ships, in order to comply with the Coast Guard's regulations, will carry AIS transmitters, destroying MariTEL's ability to use its authorized frequencies. In order to prevent the proliferation of these transmitters, the FCC must act immediately to clarify that AIS shipborne stations cannot transmit on channels 87B and 88B.


^{29/} See, e.g., *Application of Orlando Centroplex City of Orlando 500 West Livingston Street Orlando, Order*, 4 F.C.C. 1734 ¶ 8 (1989) (articulating the Commission's policy of protecting its public interest policy by minimizing interference).

III. CONCLUSION

Irrespective of whether the FCC ever intended to permit the use of shipborne AIS stations to transmit on channels 87B and 88B, it should now clarify that these stations are no longer permitted to transmit on these channels. A contrary interpretation of the *Public Notices* would constitute a violation of the APA. Moreover, irrespective of whether this interpretation violates the APA, it relies on circumstances (the now terminated MOA) that no longer exist. Finally, such an interpretation would permit shipborne stations to cause destructive interference to MariTEL's operations, eliminating MariTEL's ability to employ the frequencies it obtained from the FCC at great expense. For these reasons, the Commission should act, by no later than November 25, 2003, to clarify that the *Public Notices* do not permit transmission on channels 87B and 88B by shipborne stations.

Respectfully submitted,

MariTEL, Inc.

By: 
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Its Attorneys

October 15, 2003

CERTIFICATE OF SERVICE

I, Susan F. Duarte, do hereby certify that on this 15th day of October, the foregoing
Petition for Declaratory ruling was served on the following persons by the method indicated:

Marlene H. Dortch (*)
Secretary
Federal Communications Commission
Office of the Secretary
c/o Vistronix, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

D'Wana Terry (*)
Chief
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-C405
Washington, D.C. 20554

Maria Ringold (*)
Federal Communications Commission
Consumer and Governmental Affairs Bureau
Reference Information Center
445 12th Street S.W.
Room CY-B529
Washington, DC 20554

Keith Fickner (*)
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
445 12th Street, S.W.
Room 4-C423
Washington, DC 20554

Richard S. Hartman, Jr. (**)
Captain, U.S. Coast Guard
Chief, Office of Communication Systems
2100 2nd Street, S.W., Room 6410
Washington, D.C. 20593-0001

Qualex International (*)
Portals II
445 12th Street, S.W. Room CY-B402
Washington, D.C. 20554


Susan F. Duarte

* Via Hand Delivery

** Via first-class United States mail, postage prepaid

Exhibit B

letter signed by the OCS facility owner or operator stating which approved Alternative Security Program the owner or operator intends to use.

(b) Owners or operators of OCS facilities not in service on or before December 31, 2003, must comply with the requirements in paragraph (a) of this section 60 days prior to beginning operations or by December 31, 2003, whichever is later.

(c) The cognizant District Commander will examine each submission for compliance with this part and either:

(1) Approve it and specify any conditions of approval, returning to the submitter a letter stating its acceptance and any conditions;

(2) Return it for revision, returning a copy to the submitter with brief descriptions of the required revisions; or

(3) Disapprove it, returning a copy to the submitter with a brief statement of the reasons for disapproval.

* * *

■ 18. In § 106.415, redesignate paragraph (a)(3) as paragraph (a)(4) and add new paragraph (a)(3) to read as follows:

§ 106.415 Amendment and audit.

(a) * * *

(3) Nothing in this section should be construed as limiting the OCS facility owner or operator from the timely implementation of such additional security measures not enumerated in the approved FSP as necessary to address exigent security situations. In such cases, the owner or operator must notify the cognizant District Commander by the most rapid means practicable as to the nature of the additional measures, the circumstances that prompted these additional measures, and the period of time these additional measures are expected to be in place.

* * *

Dated: October 8, 2003.

Thomas H. Collins,

Admiral, Coast Guard, Commandant.

[FR Doc. 03-26349 Filed 10-20-03; 8:45 am]

BILLING CODE 4810-15-U

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 26, 161, 164, and 165

[USCG-2003-14757]

RIN 1625-AA67

Automatic Identification System; Vessel Carriage Requirement

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: This final rule adopts, with changes, the temporary interim rule that amends port and waterway regulations and implements the Automatic Identification System (AIS) carriage requirements of the Maritime Transportation Security Act of 2002 (MTSA) and the International Maritime Organization requirements adopted under International Convention for the Safety of Life at Sea, 1974, (SOLAS) as amended.

This rule is one in a series of final rules published in today's **Federal Register**. To best understand this rule, first read the final rule titled "Implementation of National Maritime Security Initiatives" (USCG-2003-14792), published elsewhere in today's **Federal Register**.

DATES: This final rule is effective November 21, 2003. On July 1, 2003, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this final rule.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG-2003-14757 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, room PL-401, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at <http://dms.dot.gov>.

You may inspect the material incorporated by reference at room 1409, U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001 between 8:30 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-267-6277. Copies of the material are available as indicated in the "Incorporation by Reference" section of this preamble.

FOR FURTHER INFORMATION CONTACT: If you have questions on this final rule, call Mr. Jorge Arroyo, U.S. Coast Guard Office of Vessel Traffic Management (G-MWV), by telephone 202-267-6277, toll-free telephone 1-800-842-8740 ext. 7-6277, or electronic mail jarroyo@comdt.uscg.mil. If you have questions on viewing the docket, call Andrea M. Jenkins, Program Manager, Docket Operations, Department of Transportation, at telephone 202-366-0271.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On July 1, 2003, we published a temporary interim rule with request for comments and notice of public meeting titled "Automatic Identification System; Vessel Carriage Requirement" in the **Federal Register** (68 FR 39353). This temporary interim rule was one of a series of temporary interim rules on maritime security published in the July 1, 2003, issue of the **Federal Register**. On July 16, 2003, we published a document correcting typographical errors and omissions in that rule (68 FR 41913).

We received a total of 438 letters in response to the six temporary interim rules by July 31, 2003. The majority of these letters contained multiple comments, some of which applied to the docket to which the letter was submitted, and some which applied to a different docket. For example, we received several letters in the docket for the temporary interim rule titled "Implementation of National Maritime Security Initiatives" that contained comments in that temporary interim rule, plus comments on the "Automated Identification System; Carriage Requirement" temporary interim rule. We have addressed individual comments in the preamble to the appropriate final rule. Additionally, we had several commenters submit the same comment to all six dockets. We counted these duplicate submissions as only one letter, and we addressed each comment within that letter in the preamble for the appropriate final rule. Because of statutorily imposed time constraints for publishing these regulations, we were unable to consider, in this Final Rule, comments received after the period for receipt of comments closed on July 31, 2003. Copies of late-received comments on AIS will be placed into the docket for the separate AIS Notice and request for comments that was published on July 1, 2003 (USCG 2003-14878; 68 FR 39369).

A public meeting was held in Washington, DC, on July 23, 2003, and approximately 500 people attended. Comments from the public meeting are also included in the "Discussion of Comments and Changes" section of this preamble. A transcript of this meeting is available in the docket, where indicated under **ADDRESSES**.

In order to focus on the changes made to the regulatory text since the temporary interim rule was published, we have adopted the temporary interim rule and set out, in this final rule, only the changes made to the temporary interim rule. We will place a copy of the unofficial complete regulatory text in